Supreme Court, U. S.
FILED
JAN 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, *et al.*,
Petitioners,

v.

ALFRED E. DAVIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY OF EDUCATIONAL TESTING SERVICE TO RESPONDENTS' OPPOSITION TO EDUCATIONAL TESTING SERVICE'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

HOWARD P. WILLENS
DEANNE C. SIEMER
THEODORE S. SIMS
1666 K Street, N.W.
Washington, D. C. 20006
Attorneys for Amicus Curiae
Educational Testing Service

Of Counsel:

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, *et al.*,
Petitioners,

v.

ALFRED E. DAVIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY OF EDUCATIONAL TESTING SERVICE TO RESPONDENTS' OPPOSITION TO EDUCATIONAL TESTING SERVICE'S MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Educational Testing Service ("ETS") submits that the following considerations are relevant to the Court's evaluation of Respondents' Opposition to ETS's Motion for Leave to File Brief as Amicus Curiae in this proceeding:

1. ETS's Motion for Leave to File Brief as Amicus Curiae, contrary to respondents' suggestion, is timely filed within the meaning of Rule 42(2-3). The brief *amicus curiae* submitted by ETS does not support either

the petitioners or the respondents in this proceeding. It outlines an analytical framework, presented by neither party, which the Court may find useful in defining the "job-relatedness" requirement under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ETS, in its brief, has refrained from urging upon this Court any particular disposition of this case. If the framework outlined in the brief *amicus curiae* is found by the Court to be of assistance in analyzing the issues presented by the case, ETS's objective in submitting the brief will have been fully achieved—regardless of which party prevails on this appeal.

2. Respondents have failed to inform the Court fully of the negotiations between them and ETS in connection with the proposed ETS brief. From the outset, counsel for ETS indicated to counsel for respondents that, as reflected in ETS's brief as now lodged with the Court, ETS would not support either petitioners or respondents, but would confine its arguments to the nature of the analysis to be applied to the relevant issues. This is reflected in a letter dated November 20, 1975, from counsel for ETS to counsel for respondents, reprinted for the Court's review as Appendix A. As indicated by the November 20 letter, ETS was also willing to provide counsel for respondents on December 10, 1975, with a typewritten draft of the proposed *amicus* brief that would not vary materially from the brief ultimately filed, if counsel for respondents would consent to the filing of such a brief. Counsel for respondents declined this offer without explanation in a letter of December 4, 1975 (reprinted as Appendix B) and left open the possibility that he might object to ETS's motion even if furnished with a typewritten copy of the proposed brief on December 10. Respondents' Opposition also fails to explain their unwillingness to give consent on the basis proposed by ETS, although Rule 42(3) of the Rules of the Supreme Court requires that a party objecting to the filing of an *amicus* brief should state "the reasons for withholding consent."

3. Respondents do not suggest that ETS's interest and the questions of law raised by the ETS *amicus* brief have been adequately presented by the parties. Instead, respondents assert that ETS's interest is not materially different from that presented in other *amicus* briefs to which respondents have not objected. The interest of the *amici* are readily distinguishable. ETS's interest, as set forth fully in its Motion for Leave to File Brief as Amicus Curiae, is that of a test producer providing a broad range of testing instruments. The American Society for Personnel Administration represents a large group of test users. The Industrial Psychology Division of the American Psychological Association represents many of the professionals involved in test validation who essentially stand between the test producer and the test user, typically affiliated with neither. Consideration of each of these viewpoints and interests should be helpful to the Court in weighing the public policy aspects of its decision in this case.

For the reasons stated above and in its Motion for Leave to File Brief as Amicus Curiae, ETS respectfully requests that its brief *amicus curiae* be filed with this Court.

Respectfully submitted,

HOWARD P. WILLENS
DEANNE C. SIEMER
THEODORE S. SIMS
1666 K Street, N.W.
Washington, D. C. 20006
Attorneys for Amicus Curiae
Educational Testing Service

Of Counsel:

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D. C. 20006

APPENDIX A

[Letterhead omitted in printing]

November 20, 1975

Richard B. Sobol, Esq.
1520 New Hampshire Avenue, N.W.
Washington, D.C. 200036

Dear Mr. Sobol:

I regret that we have been unable to reach an understanding as to a basis agreeable to you on which, as counsel for respondents in *Davis* v. *Washington*, you will consent to the submission by Educational Testing Service on December 20, 1975 of a brief as *amicus curiae*. I am writing to make certain that we understand your position and you ours.

As I explained to you on the telephone, the concern which in large measure prompted ETS' decision to file an *amicus curiae* brief is that, if the Court reaches the question whether the District of Columbia's validation data is adequate, it could rule in an unnecessarily broad fashion that might affect the permissible range of validation options for non-employment tests. My understanding is that you recognize this to be a legitimate concern of ETS, that you would be willing to consent to ETS' submission of an *amicus curiae* brief on or before December 5, but that you would not consent to the filing of a brief by ETS simultaneously with yours since you would have no way of knowing whether that brief contained anything to which you would feel constrained to respond.

We do not feel that it will be possible to complete the necessary review and printing before December 20. We do, however, recognize the nature of your concerns.

Accordingly, we would be willing, in return for your consent, to make the following accommodations: (1) ETS' submission would be directed to the manner in which a broad opinion on the validation question could unnecessarily affect the validation of non-employment tests which, in ETS' view, present significantly different validation issues; (2) ETS would refrain from urging a particular disposition of the validation issue except insofar as ETS believes that issue properly should be disposed of on the narrowest possible grounds; and (3) on December 10, 1975, ETS would furnish you with a typewritten draft of the brief which would not vary materially from the printed brief ultimately filed with the Court.. Thus, you would be able to ascertain whether ETS' brief contained anything to which you felt the need to respond in time for that response to be included in your brief to be filed on December 20, 1975.

If, on reflection, you should conclude that on this basis you could consent at this time, we would be most grateful. If you are unable to consent, we shall prepare the necessary motion and submit it together with the consent of the petitioner, a copy of which is enclosed.

If you have any further thoughts on this question, please feel free to let me know.

Sincerely yours,

/s/ Ted Sims
THEODORE S. SIMS

Enclosure

APPENDIX B

[Letterhead omitted in printing]

December 4, 1975

Theodore S. Sims, Esq.
Wilmer, Cutler & Pickering
1666 K Street, N. W.
Washington, D. C. 20006

Re: *Davis* v. *Washington*

Dear Mr. Sims:

I have considered with my co-counsel the proposal set forth in your letter of November 20, 1975 concerning respondents' possible consent to a filing of a brief *amicus curiae* by the Educational Testing Service on December 20. We will not consent on that basis.

If you supply us with a typewritten draft of your brief on December 10, we will likely file no opposition to your motion. If you do not, we will oppose your motion on the ground that it is untimely.

With my best,

Sincerely,

/s/ Richard B. Sobol
RICHARD B. SOBOL

RBS:eb

CERTIFICATE OF SERVICE

I, Howard P. Willens, a member of the Bar of this Court and counsel for Educational Testing Service, hereby certify that I have this 7th day of January, 1976, caused three copies of the Reply of Educational Testing Service to Respondents' Opposition to Educational Testing Service's Motion for Leave to File Brief as Amicus Curiae to be mailed, with first class postage thereon prepaid, to Louis P. Robbins, Esq., Acting Corporation Counsel for the District of Columbia, counsel for petitioners Walter E. Washington, *et al.*; Robert H. Bork, Esq., Solicitor General of the United States; and Richard B. Sobol, Esq., counsel for respondents Alfred E. Davis, *et al.* I further certify that all parties required to be served have been served.

HOWARD P. WILLENS
Attorney for Amicus Curiae
Educational Testing Service